

IN THE SUPREME COURT OF MISSOURI

RAYMOND BLOOMQUIST, D.O.,)	
)	
)	<i>Relator,</i>
vs.)	
)	N ^o SC88456
HON. NANCY L. SCHNEIDER, Judge,)	
St. Charles County Circuit Court,)	
)	
)	<i>Respondent.</i>

PETITION FOR EXTRAORDINARY WRIT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
THE HONORABLE NANCY L. SCHNEIDER, JUDGE

BRIEF ON BEHALF OF RESPONDENT

Respectfully submitted,

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CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
POINTS RELIED ON	2
I. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Mo. Rev. Stat. § 516.200, as applied to the facts of this case, does not present a Constitutional question requiring an analysis of the Commerce Clause in that the medical malpractice complained of in the underlying petition occurred in Missouri between a doctor and patient who were both residents of this State. (Responding to Point I of Relator’s brief.)	2
II. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Missouri’s tolling statute is not an impermissible burden on interstate commerce in that its express purpose is to apply only to residents of this state who have statutory authority to appoint an agent for service of process should they leave	

the state, and Missouri has a legitimate interest in regulating its residents who commit harm against other residents in this state. (Responding to Point I of Relator’s brief.) 3

STATEMENT OF FACTS 4

POINT I 5

 STANDARD OF REVIEW 5

 ARGUMENT 6

 A. The Commerce Clause analysis of *Bendix* is not applicable because Dr. Bloomquist was a Missouri resident at the time the cause of action accrued 7

 B. Dr. Bloomquist was not acting in the course of interstate commerce when he committed medical malpractice 9

 C. Summary 13

POINT II 15

 STANDARD OF REVIEW 15

<u>Contents, cont.</u>	<u>Page</u>
ARGUMENT	16
A. Missouri authorizes the appointment of an agent for service of process	16
B. Missouri’s legitimate interests in tolling statute of limitations outweighs any impact to interstate commerce under these facts	18
C. Should this Court determine Mo. Rev. Stat. § 516.200 unconstitutional as a result of <i>Bendix</i> , then such determination should be applied prospectively as a procedural change in accordance with the well-settled rule of law in Missouri	20
D. Summary	23
CONCLUSION	25
CERTIFICATE OF ATTORNEY	26
CERTIFICATE OF SERVICE	27

AUTHORITIES

Page

Constitutions

MO. CONST 1

U.S. CONST. 10

Cases

Abramson v. Brownstein,

897 F.2d 389 (9th Cir. 1990) 11

Asahi Metal Industry Co. v. Superior Court,

480 U.S. 102 (1987) 17

Barker v. St. Louis County,

104 S.W.2d 371 (Mo. 1937) 21

Bendix v. Autolite Corp. v. Midwesco Enterprises, Inc.,

486 U.S. 888 (1988) *passim*

Blaske v. Smith & Entzeroth, Inc.,

821 S.W.2d 822 (Mo. 1991) 5, 15

Bottineau Farmers Elevator v. Woodward-Clyde Consultants,

963 F.2d 1064 (8th Cir. 1992) 11

<u>Authorities, cont.</u>	<u>Page</u>
<i>Cadles of Grassy Meadows II v. Olney Savings Assoc.,</i> 2007 WL 1701839 (N.D. Tex.)	11
<i>Chase Securities Corp. v. Donaldson,</i> 325 U.S. 304 (1945)	23
<i>Dietz v. Humphreys,</i> 507 S.W.2d 389 (Mo. 1974)	21
<i>Doel v. Phillips,</i> 194 S.W.3d 833 (Mo. 2006)	5
<i>Dupree v. Zenith Goldline Pharmaceuticals, Inc.,</i> 63 S.W.3d 220 (Mo. 2002)	<i>passim</i>
<i>Eberle v. Kopljar,</i> 85 S.W.2d 919 (Mo. Ct. App. 1935)	21
<i>Edwards v. California,</i> 314 U.S. 160 (1941)	9
<i>Garth v. Robards,</i> 20 Mo. 523 (Mo. 1855)	18

<u>Authorities, cont.</u>	<u>Page</u>
<i>Gibbons v. Ogden</i> ,	
22 U.S. 1 (1824)	7, 10, 12, 23
<i>Heart of Atlanta Motel, Inc. v. United States</i> ,	
379 U.S. 241 (1964)	12
<i>Jamison v. State Dep't of Social Svcs.</i> ,	
218 S.W.3d 399 (Mo. 2007)	5, 15
<i>Katzenbach v. McClung</i> ,	
379 U.S. 294 (1964)	10
<i>Keltner v. Keltner</i> ,	
589 S.W.2d 235 (Mo. 1979)	20
<i>Kohan v. Cohan</i> ,	
204 Cal. App. 3d 915 (Ct. App. 1988)	12
<i>Poling v. Moitra</i> ,	
717 S.W.2d 520 (Mo. 1986)	<i>passim</i>
<i>Pratali v. Gates</i> ,	
4 Cal. App. 4th 632 (Ct. App. 1992)	12

<u>Authorities, cont.</u>	<u>Page</u>
<i>Rademeyer v. Farris</i> ,	
145 F.Supp.2d 1096 (E.D. Mo. 2001),	
<i>aff'd</i> 284 F.3d 833 (8th Cir. 2002)	11, 13, 22
<i>Schnorbus v. Dir. of Revenue</i> ,	
790 S.W.2d 241 (Mo. 1990)	6
<i>Sheehan v. Sheehan</i> ,	
901 S.W.2d 57 (Mo. 1995)	6
<i>Smith v. Forty Million</i> ,	
395 P.2d 201 (Wash. 1964)	18
<i>State v. Casaretto</i> ,	
818 S.W.2d 313 (Mo. Ct. App. 1991)	21
<i>State v. Pike</i> ,	
162 S.W.3d 464 (Mo. 2005)	5, 15
<i>State v. Shafer</i> ,	
609 S.W.2d 153 (Mo. 1980)	21
<i>Stewart v. Sturms</i> ,	
784 S.W.2d 257 (Mo. Ct. App. 1989)	21

<u>Authorities, cont.</u>	<u>Page</u>
<i>Sumners v. Sumners,</i>	
701 S.W.2d 720 (Mo. 1985)	20
<i>Tesar v. Hallas,</i>	
738 F.Supp. 240 (N.D. Ohio 1990)	11
<i>Thomas v. Black,</i>	
22 Mo. 330 (1856)	8
<i>United C.O.D. v. State,</i>	
150 S.W.3d 311 (Mo. 2004)	5
<i>Wimberly v. Labor & Indus. Relations Comm'n of Mo.,</i>	
688 S.W.2d 344 (Mo. 1985)	22
<i>Wise v. Morrison,</i>	
2000 WL 1089518, 4 (Ohio Ct. App.) (unreported)	19
<i>World-Wide Volkswagen Corp. v. Woodson,</i>	
444 U.S. 286 (1980)	17
<u>Statutes (Mo. Rev. Stat.)</u>	
§ 506.150	8, 17
§ 516.200	<i>passim</i>

<u>Authorities, cont.</u>	<u>Page</u>
<u>Rules (Mo. Ct. R.)</u>	
84.04	4
84.06	26

JURISDICTIONAL STATEMENT

Respondent adopts and incorporates the jurisdictional statement offered by Relator in his brief and additionally states that, because of the challenge to the validity of a statute, this Court has exclusive appellate jurisdiction pursuant to the Missouri Constitution, art. V, § 3.

POINTS RELIED ON

I. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Mo. Rev. Stat. § 516.200, as applied to the facts of this case, does not present a Constitutional question requiring an analysis of the Commerce Clause in that the medical malpractice complained of in the underlying petition occurred in Missouri between a doctor and patient who were both residents of this State. (Responding to Point I of Relator’s brief.)

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,

486 U.S. 888 (1988)

Gibbons v. Ogden,

22 U.S. 1 (1824)

Dupree v. Zenith Goldline Pharmaceuticals, Inc.,

63 S.W.3d 220 (Mo. 2002)

Mo. Rev. Stat. § 516.200

U.S. CONST., art. 1, § 8, cl. 3

II. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Missouri’s tolling statute is not an impermissible burden on interstate commerce in that its express purpose is to apply only to residents of this state who have statutory authority to appoint an agent for service of process should they leave the state, and Missouri has a legitimate interest in regulating its residents who commit harm against other residents in this state. (Responding to Point I of Relator’s brief.)

Poling v. Moitra,

717 S.W.2d 520 (Mo. 1986)

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,

486 U.S. 888 (1988)

Keltner v. Keltner,

589 S.W.2d 235 (Mo. 1979)

Mo. Rev. Stat. § 516.200

Mo. Rev. Stat. § 506.150

STATEMENT OF FACTS

Plaintiff adds the following additional facts for clarification in accordance with Mo. Ct. R. 84.04(f):

The underlying lawsuit involves medical malpractice. At the time of the malpractice, Dr. Bloomquist and his patient, Plaintiff Leiloni Popoalii, were both residents of the State of Missouri. (Appendix, A-24.). Dr. Bloomquist treated Popoalii between March 19, 2004, and July 2, 2004. (Appendix, A-27). Throughout this period, Popoalii suffered excruciating headaches, repeatedly reported her loss of vision, and screamed uncontrollably from pain as her condition worsened. (Appendix, A-26-29). Despite her serious medical condition, Dr. Bloomquist failed to treat Popoalii's meningitis, which caused her to suffer permanent and irreparable blindness. (Appendix, A-31). Dr. Bloomquist was not engaged in interstate commerce in his medical profession; he was engaged in the treatment of patients in Missouri. (Appendix, A-24). In February, 2006, Dr. Bloomquist left Missouri and changed his domicile to Kansas. (Appendix, A-24). Plaintiff filed her cause of action on July 31, 2006. (Appendix, A-1).

POINT I. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Mo. Rev. Stat. § 516.200, as applied to the facts of this case, does not present a Constitutional question requiring an analysis of the Commerce Clause in that the medical malpractice complained of in the underlying petition occurred in Missouri between a doctor and patient who were both residents of this State.

(Responding to Point I of Relator's brief.)

STANDARD OF REVIEW

Whether a statute is unconstitutional is a question of law, the review of which is *de novo*. *Jamison v. State Dep't of Social Svcs.*, 218 S.W.3d 399, 404 (Mo. 2007) (citing *Doel v. Phillips*, 194 S.W.3d 833, 841 (Mo. 2006)). This Court has consistently held that all statutes are presumed to be constitutional. *See State v. Pike*, 162 S.W.3d 464, 471 (Mo. 2005). A statute will not be held unconstitutional unless "it clearly and undoubtedly contravenes the constitution." *Id.* (citing *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. 2004)). Doubts will be resolved in favor of the constitutionality of the statute. *Pike* at 471.

"When the constitutionality of a statute is attacked, the burden is upon the party claiming the statute is unconstitutional to prove the statute is unconstitutional." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828-29

(Mo. 1991) (*citing Schnorbus v. Dir. of Revenue*, 790 S.W.2d 241, 243 (Mo. 1990)). "The petition is construed liberally, treating all facts alleged as true and construing allegations favorably to the plaintiff." *Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 221 (Mo. 2002) (*citing Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. 1995)).

ARGUMENT

This case involves the application of Missouri's tolling statute, Mo. Rev. Stat. § 516.200, to the instant facts. The facts are virtually identical to those in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. 1986), in which this Court held that the two-year statute of limitations for medical malpractice claims against a physician are tolled when the physician leaves Missouri to reside in another state, notwithstanding that the physician could be served under Missouri's long-arm statute. *Poling* at 523 (*citing* Mo. Rev. Stat. § 516.200). However, Dr. Bloomquist claims that the tolling statute should now be held unconstitutional as an impermissible burden upon interstate commerce pursuant to *Bendix v. Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

In *Bendix*, the United States Supreme Court struck down an Ohio tolling statute because it tolled the statute of limitations against a foreign corporation engaged in the business of interstate commerce. The Court held: "Where a

State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the State law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce." *Bendix*, 486 U.S. at 893. However, the Commerce Clause may not be applied to void a state law where the facts do not rise to the "importance and elevation, as to be deemed commercial regulations." *Gibbons v. Ogden*, 22 U.S. 1, 20 and 67 (1824) (recognizing that state regulations pertaining to the public health do not "partake of the character of regulations of the Commerce of the United States").

Thus, before *Bendix* may be applied herein, this Court must first determine if the facts alleged in the underlying petition establish that any of the parties were non-residents of Missouri engaged in interstate commerce. When a physician is a resident of Missouri and treats a patient who is also a resident of Missouri, and that treatment occurs in Missouri, there is no impact upon interstate commerce which would cause the application of the Commerce Clause analysis described in *Bendix*.

- A. The Commerce Clause analysis of *Bendix* is not applicable because Dr. Bloomquist was a Missouri resident at the time the cause of action accrued.

Dr. Bloomquist was a Missouri resident at the time he committed malpractice in his treatment of Popoalii. In *Bendix*, the Court was concerned specifically with the burden upon a foreign corporation from having to choose to appoint an agent in a state which did not have general jurisdiction over the foreign corporation or, alternatively, running the risk that a statute of limitations would run in perpetuity. *Bendix*, 486 U.S. at 893. Section 516.200, however, is — and has been since 1845 — consistently applied only to residents of this state and the statute is not intended, by its plain language, to affect non-residents of Missouri. *Dupree, supra*, 63 S.W.3d at 222 (citing *Thomas v. Black*, 22 Mo. 330, 332 (1856); *Ahern v. Lafayette Pharmacal, Inc.*, 729 S.W.2d 501, 504 (Mo. Ct. App. 1987) (finding § 516.200 does not apply where the defendant was not a resident of Missouri at the time of the cause of action)). Dr. Bloomquist does not meet the first element of *Bendix* — that he was a non-resident of Missouri. *Bendix*, 486 U.S. at 893.

In this case, Dr. Bloomquist committed a tort in this state while a resident and there is no doubt that he is subject to the jurisdiction of Missouri. Additionally, as discussed *infra*, Dr. Bloomquist is not forced to stay in Missouri until the statute of limitations runs because he may avoid tolling by appointing an agent for service of process pursuant to Mo. Rev. Stat. § 506.150.

He is neither in the same position as the foreign corporation in *Bendix* nor similarly situated to a pauper who was prohibited from entering a state as in *Edwards v. California*, 314 U.S. 160 (1941). In *Edwards*, the United States Supreme Court struck down a criminal law prohibiting the transportation of indigent persons into California. The Court recognized the "express purpose" of the statute's prohibition was to impact interstate commerce. *Edwards* at 174. Dr. Bloomquist's ability to relocate is neither restricted nor otherwise inhibited by § 516.200.

The tolling provision of § 516.200 does not prohibit Dr. Bloomquist from relocating, as in *Edwards*, and does not demand that Dr. Bloomquist subject himself to the jurisdiction of a foreign forum, as in *Bendix*. The statute simply suspends a cause of action where jurisdiction already existed. Dr. Bloomquist does not, and cannot, meet his burden of establishing the first requirement of *Bendix* — that he was a non-resident of Missouri at the time the cause of action accrued.

B. Dr. Bloomquist was not acting in the course of interstate commerce when he committed medical malpractice.

Dr. Bloomquist also cannot demonstrate that the second element of *Bendix* applies - that his medical treatment of Popoalii was performed in the course of

interstate commerce. *Bendix*, 486 U.S. at 893. The Commerce Clause of the United States Constitution confers upon Congress the power to "regulate commerce among the several states." U.S. CONST., art. I, § 8, cl. 3. "The correct definition of commerce is the transportation and sale of commodities." *Gibbons v. Ogden*, *supra*, 22 U.S. at 31. The Commerce Clause applies to intrastate activities where there is "substantial economic effect on interstate commerce". *Katzenbach v. McClung*, 379 U.S. 294, 382-83 (1964) (citations omitted) (affirming power of Commerce Clause "extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce"). The exception to the Commerce Clause power is where the activities are "those which are completely [within] a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Katzenbach* at 383 (citing *Gibbons*, 22 U.S. at 194).

Here, Dr. Bloomquist's medical malpractice, which caused a Missouri resident's permanent blindness, occurred in Missouri while Dr. Bloomquist was a Missouri resident. When a physician is a resident of Missouri and treats a patient who is also a resident of Missouri, and that treatment occurs in Missouri, there is no impact upon interstate commerce which would cause the application

of the Commerce Clause analysis described in *Bendix*. Dr. Bloomquist's defense of "interstate commerce" to the tolling of the state-law medical malpractice claim is erroneous.

The requirement of interstate commerce for the application of *Bendix* is recognized specifically in post-*Bendix* cases decided in other jurisdictions. Indeed, the cases cited by Dr. Bloomquist reflect the required element that the cause of action involve interstate commerce. *Bendix*, 486 U.S. at 889 (Illinois corporation delivered and installed boiler system in Ohio); *Rademeyer v. Farris*, 145 F.Supp.2d 1096 (E.D. Mo. 2001), *aff'd* 284 F.3d 833 (8th Cir. 2002) (sale of Missouri corporation to Florida corporation which was regulated by federal Securities and Exchange Commission); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064 (8th Cir. 1992) (Nevada corporation performing engineering services for grain silo in N. Dakota); *Cadles of Grassy Meadows II v. Olney Savings Assoc.*, 2007 WL 1701839 (N.D. Tex.) (recognizing interstate commerce requirement in finding defendants traveled from N.Y. to Texas for purpose of signing promissory notes for corporate loan from bank); *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990) (Mass. resident engaged in interstate commerce when he entered into agreement to purchase gold coins from California residents). *But see Tesar v. Hallas*, 738

F.Supp. 240, 242 (N.D. Ohio 1990) (relocation in another state for purposes of employment considered with additional burden of inability to appoint an agent for service violated Commerce Clause).

Other state appellate courts have distinguished *Bendix* and not applied a Commerce Clause analysis where the complaint involved state residents and did not allege interstate commerce. The reasoning is that "there is no interaction" between the state's tolling statute and the Commerce Clause because the parties to the cause of action were local residents at the time of the injury, and the injury did not involve interstate commerce. *See Pratali v. Gates*, 4 Cal. App. 4th 632, 643 (Ct. App. 1992); *Kohan v. Cohan*, 204 Cal. App. 3d 915, 924 (Ct. App. 1988); *see also Gibbons, supra*, 22 U.S. at 74 (Commerce Clause does not apply where the injury occurs by and between residents of the same state). In *Pratali*, two California residents traveled to Las Vegas, Nevada, where they made a promissory note for the repayment of a cash loan. *Pratali* at 635. The debtor later moved to Idaho, resulting in the tolling of the statute of limitations. *Id.* at 636. The debtor unsuccessfully attempted to characterize the transaction as interstate commerce and urged the application of *Bendix*. *Id.* at 643. This argument was rejected because there were "insufficient circumstances impacting on interstate commerce to invoke the commerce clause." *Id.* (citing *Heart of*

Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-58 (1964)).

Even in *Rademeyer v. Farris*, *supra*, the cause of action involved interstate commerce based upon the purchase of a Missouri corporation by a publicly-held corporation based in Florida. *Rademeyer*, 145 F.Supp.2d at 1101. The corporate purchase was regulated by the Securities and Exchange Commission, a federal agency. Additionally, the court noted that the individual defendant moved from Missouri to Florida for the specific purpose of employment with the new corporation. *Id.*

Dr. Bloomquist has not met his burden of demonstrating he was engaged in interstate commerce, as required by the second element of *Bendix*. There is no case supporting his position that the mere relocation of the defendant from Missouri, without more, warrants the application of the Commerce Clause. The absence of impact to interstate commerce in this case is fatal to Dr. Bloomquist's Commerce Clause argument.

C. Summary

Quite simply, the underlying petition involves a medical malpractice claim which occurred in Missouri when the doctor and patient were both residents of this State. *Bendix* is not applicable because that case does not involve a foreign entity engaged in interstate commerce. As the Supreme Court expressed in

Bendix, the specific facts of that case involved an out-of-state corporation engaged in the sale of merchandise across state lines which rendered the Ohio tolling statute unconstitutional when construed under the Commerce Clause.

Bendix, 486 U.S. at 894. Where, as here, the facts do not involve interstate commerce, this Court will not reach any such Constitutional argument. Section 516.200, as applied to the facts of this case, does not clearly and undoubtedly contravene the Commerce Clause.

POINT II. Relator is not entitled to an order mandating the trial court to dismiss the medical malpractice case because Missouri's tolling statute is not an impermissible burden on interstate commerce in that its express purpose is to apply only to residents of this state who have statutory authority to appoint an agent for service of process should they leave the state, and Missouri has a legitimate interest in regulating its residents who commit harm against other residents in this state. (Responding to Point I of Relator's brief.)

STANDARD OF REVIEW

Whether a statute is unconstitutional is a question of law, the review of which is *de novo*. *Jamison v. State Dep't of Social Svcs.*, *supra*, 218 S.W.3d at 404 (citations omitted). This Court has consistently held that all statutes are presumed to be constitutional. *See State v. Pike*, *supra*, 162 S.W.3d at 471. A statute will not be held unconstitutional unless "it clearly and undoubtedly contravenes the constitution." *Id.* (citations omitted). Doubts will be resolved in favor of the constitutionality of the statute. *Id.*

"When the constitutionality of a statute is attacked, the burden is upon the party claiming the statute is unconstitutional to prove the statute is unconstitutional." *Blaske v. Smith & Entzeroth, Inc.*, *supra*, 821 S.W.2d at 828-

29 (citations omitted). "The petition is construed liberally, treating all facts alleged as true and construing allegations favorably to the plaintiff." *Dupree, supra*, 63 S.W.3d at 221 (citations omitted).

ARGUMENT

Assuming, *arguendo*, that *Bendix* is applicable to this cause of action, § 516.200 provides a permissible means of protecting Missouri residents from other residents who commit harm against them and then leave the state. When a state regulation restricts interstate commerce, the interests of the state are weighed to determine if the burden on interstate commerce is reasonable. *Bendix*, 486 U.S. at 891. Missouri's tolling statute withstands constitutional scrutiny under the Commerce Clause in this case because there is little, if any, burden on interstate commerce.

- A. Missouri authorizes the appointment of an agent for service of process.

The statutory authority to appoint an agent for service of process protects § 516.200 from a finding of unconstitutionality. In *Bendix*, the United States Supreme Court found Ohio's tolling statute impermissibly burdened interstate commerce for two specific reasons: 1) there was no "statutory support" for the suggestion that the corporation could appoint an agent for service of process;

and 2) the designation of an agent in Ohio would have subjected the foreign corporation to the general jurisdiction of the state where it did not have minimum contacts necessary for supporting personal jurisdiction. *Bendix*, 486 U.S. at 892-93 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987)).

Contrary to Ohio's statutory scheme as found in *Bendix*, Missouri specifically authorizes a resident who leaves Missouri to avoid tolling by appointing an agent whereby service may be accomplished. Mo. Rev. Stat. § 506.150; *Poling v. Moitra, supra*, 717 S.W.2d at 522. Thus, should a Missouri resident wish to leave the State, all one needs to do to avoid the tolling of the statute of limitations is to appoint an agent for service of process. Dr. Bloomquist, as a Missouri resident, had this remedy available to him. Indeed, this Court's decision in *Poling* holding as much is directly on point.

While Dr. Bloomquist argues that *Bendix* impliedly nullifies § 516.200, the concerns raised in *Bendix* are simply not present in this case. The *Bendix* analysis is inapposite in this case because Missouri's tolling statute "does not apply to entities that are nonresidents at all relevant times." *Dupree, supra*, 63 S.W.3d at 222 (citations omitted). Unlike Ohio, Missouri has statutory

authorization for the appointment of an agent, and this has been the rule of law in Missouri for over 150 years. *See Garth v. Robards*, 20 Mo. 523 (Mo. 1855). Furthermore, consistent with the majority view among the states, where a statute allows an agent to be appointed for service of process, the appointment of an agent does not toll the statute of limitations during the defendant's absence. *See id.*; *Smith v. Forty Million*, 395 P.2d 201, 203 (Wash. 1964).

A resident is not forced to waive the limitations defense when leaving Missouri. The statutory authority for the appointment of an agent relieves residents of the potential burden of having to stay in this state for the duration of the statute of limitations. The statutory ability of a resident to appoint an agent when he leaves the state was not available in *Bendix* and was an important factor in the United States Supreme Court's decision to declare Ohio's tolling statute an impermissible burden on commerce. Unlike the foreign corporation in *Bendix*, Dr. Bloomquist could have avoided the tolling by appointing an agent in Missouri. His failure to do so weighs heavily against his demand that this Court hold § 516.200 unconstitutional under the Commerce Clause.

B. Missouri's legitimate interests in tolling statute of limitations outweighs any impact to interstate commerce under these facts.

Missouri has a legitimate interest in ensuring its residents have the ability

to seek recourse when a tort-feasor flees the state, especially when the tort is committed by another resident. These interests were recognized by this Court in *Poling v. Moitra*. In *Poling*, this Court reasoned that "it would be inequitable to require a plaintiff to chase the defendant into another state to avoid the bar of the statute of limitations." *Poling*, 717 S.W.2d at 522. "Practical concerns" also support tolling when a resident leaves the state because "[o]btaining non-defective service under a long-arm statute is difficult, both with respect to finding the out-of-state defendant and in getting authorities to serve the defendant when he is found." *Id.* These concerns continue to be valid.

Missouri's interest in protecting its residents where the harm occurs in Missouri by another resident survives a Commerce Clause analysis, especially when compared to the interests of other statutes which have been struck down under *Bendix*. Section 516.200 has minimal impact on interstate commerce, if any, because it applies only to individuals who are residents of Missouri at the time the cause of action accrues. *See Dupree, supra*, 63 S.W.3d at 222. In this case, the tolling amounted to extend the statute of limitations for 29 days. Certainly, a period of one month is reasonable to toll the statute of limitations against residents who flee the state without appointing an agent for service of process. *See Wise v. Morrison*, 2000 WL 1089518, 4 (Ohio Ct. App.)

(unreported) (finding the extension of the statute of limitations by a period of 14 days is not an unreasonable period of time as to place an unreasonable burden upon interstate commerce).

C. Should this Court determine Mo. Rev. Stat. § 516.200 unconstitutional as a result of *Bendix*, then such determination should be applied prospectively as a procedural change in accordance with the well-settled rule of law in Missouri.

In the event this Court deems § 516.200 violates the Commerce Clause, then such a change in Missouri law should be applied prospectively. This Court has authority to declare the effect of a decision to be applied retroactively or prospectively. *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (citations omitted). In making this determination, the decision should be based on the merits of each individual case. *Id.* (citations omitted). The general rule is to apply retroactive effect of changes in the law. *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. 1985) (*citing Keltner*, 589 S.W.2d at 239). However, there are two specific exceptions: 1) where the change pertains to procedural as opposed to substantive law; and 2) "if the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively only in order to avoid injustice and unfairness." *Sumners* at 723.

In this case, both exceptions are met because statutes of limitations are procedural and the Plaintiff relied upon this Court's established case law which is directly on point. *See Poling v. Moitra, supra.*

The first exception is met because this case involves a statute of limitations. Statutes of limitations are procedural. *See State v. Casaretto*, 818 S.W.2d 313, 316 (Mo. Ct. App. 1991). "A procedural law is one which prescribes a method of enforcing rights or obtaining redress for their invasion and does not affect any existing substantive right or its correlated duty." *Id.* (citing *Stewart v. Sturms*, 784 S.W.2d 257, 261 (Mo. Ct. App. 1989)). When a procedural rule of law is overturned, that decision is applied prospectively. *See State v. Shafer*, 609 S.W.2d 153, 157 (Mo. 1980) (citing *Barker v. St. Louis County*, 104 S.W.2d 371, 377-78 (Mo. 1937); *Dietz v. Humphreys*, 507 S.W.2d 389, 392 (Mo. 1974); *Eberle v. Koplar*, 85 S.W.2d 919, 923 (Mo. Ct. App. 1935)).

The second exception is also met because Missouri judges and lawyers have substantially and continually relied upon § 516.200, and *Poling v. Moitra*, 717 S.W.2d at 522, and neither this Court nor the United States Supreme Court has declared § 516.200 unconstitutional. Plaintiff affirmatively relied upon the tolling provisions of § 516.200 in prosecuting her cause of action. Plaintiff

alleged facts which invoked the tolling provisions of the statute, thus making her cause of action timely, and also dismissed other parties in reliance upon *Poling*.

In support of retroactivity, Dr. Bloomquist asserts that lawyers throughout Missouri "cannot credibly claim surprise" that § 516.200 may be held unconstitutional because of the Eighth Circuit's affirmance of *Rademeyer v. Farris*.¹ Dr. Bloomquist gives more weight to *Rademeyer* than is permitted, as it is not binding precedent in Missouri. *See Wimberly v. Labor & Indus. Relations Comm'n of Mo.*, 688 S.W.2d 344, 347 (Mo. 1985). On the other hand, *Poling v. Moitra*, which was decided by this Court, is controlling. *See Wimberly* at 347. More importantly, this Court's decision in *Dupree* rebuts Dr. Bloomquist's visionary argument. *See Dupree, supra*, 63 S.W.3d 220. In *Dupree*, this Court considered the issue of tolling the statute of limitations, including § 516.200. While this Court ruled that that statute was not applicable in that case, it provided affirmative acknowledgment of the statute and no hint that the statute was invalid. *Id.* at 222. Thus, this Court has examined § 516.200 after *Bendix* and continues to cite it authoritatively.

Should a change in procedural law not be applied prospectively, the hardship to Popoalii and other similarly-situated plaintiffs is to deny their causes

¹ 145 F.Supp.2d 1096 (E.D. Mo. 2001), *aff'd* 284 F.3d 833 (8th Cir. 2002).

of action without reaching the merits of their cases. Popoalii would suffer substantial hardship by being denied her ability to litigate the medical malpractice case against Dr. Bloomquist, which caused her permanent blindness. Prospective application does not give Popoalii a windfall; it simply provides her the ability to have her day in court to prove the merits of her case. Prospective application would not cause any hardship to Dr. Bloomquist because it would simply allow him the opportunity to defend the cause of action. Statute of limitations defenses are not a fundamental right. *Bendix*, 486 U.S. at 893 (*citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). Requiring Dr. Bloomquist to defend a cause of action on the merits of the case imposes no more a hardship upon him than upon any other defendant in a lawsuit.

Should this Court issue a decision making its preliminary writ of prohibition permanent in this cause, then Plaintiff requests this Court to permit Popoalii to litigate her cause of action by applying the decision prospectively in accordance with well-settled rules of application for procedural changes in the law.

D. Summary

As a Missouri resident, Dr. Bloomquist is subject to the laws of this state. *See Gibbons v. Ogden, supra*, 22 U.S. at 80 (recognizing a state has the inherent

power to govern its citizens). Dr. Bloomquist could have avoided the tolling of the statute of limitations by appointing an agent. He failed to do so. He now seeks the protection of this Court under the guise of "interstate commerce" after he committed malpractice in this state while he was a Missouri resident. Dr. Bloomquist has not met his burden of proving the tolling statute "clearly and undoubtedly contravenes" the Commerce Clause under the facts of this case. However, should this Court find Mo. Rev. Stat. § 516.200 unconstitutional and overturn clear, direct precedent established by *Poling v. Moitra*, such a decision should be applied prospectively as a procedural change of law.

CONCLUSION

Plaintiff Leiloni Popoalii, by her counsel, and on behalf of Respondent, the Honorable Nancy L. Schneider, hereby prays this Court to hear this matter and issue its order quashing its preliminary writ or, in the alternative, applying a permanent order prospectively to this cause; and for such further orders as are just and appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) in that:

(A) It contains 5,079 words, as calculated by the undersigned's word-processing program;

(B) A copy of this brief is on the attached 3½-inch diskette; and

(C) The diskette has been scanned for viruses by the undersigned's anti-virus program and is free from any virus.

SAMANTHA ANNE HARRIS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties and counsel of record by First Class U.S. Mail on August 13, 2007:

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